A

DATUK BANDAR KUCHING UTARA

v.

KUCHING PLAZA SDN BHD & ORS

B

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH JC
[SUIT NO: 22-243-98-III (I)]
29 JANUARY 2007

C ***REVENUE LAW:*** *Property tax - Assessment - Liability - Building sub-lots - Strata titles not issued - Whether registered owner or purchasers of sub-lots liable to pay for assessment bills - Whether term "registered owner" includes "beneficial owner" in Land Code (Cap. 81) (Sarawak) - Whether item 101 Limitation Ordinance (Cap. 49) (Sarawak)* D *applicable - Whether fees on unpaid rates complied with statutory provisions - Whether claim by local authority competent*

The plaintiff was a local authority empowered to collect assessment rates due by property owners. The 1st defendant was E a registered proprietor of a building known as Kuching Plaza. The 1st defendant sold various sub-lots in Kuching Plaza to various purchasers who had paid the purchase prices in full and were in sole and exclusive possession and occupation of the sub-lots. The 2nd, 3rd, 4th and 5th defendants were a few of the purchasers F thereof and were added as defendants pursuant to an order of the court dated 27 April 2000. The 1st defendant still owned the unsold sub-lots. There were also no subsidiary strata titles issued for the sub-lots by the relevant authority despite the fact that an application was made for the issuance thereof.

G The issues were (1) whether the liability to pay for the assessment bills issued by the plaintiff on the sub-lots rested with the 1st defendant or the purchasers of the sub-lots; (2) whether item 101 of the Limitation Ordinance (Cap. 49) (Sarawak) was applicable; (3) whether the plaintiff complied with statutory provisions in H imposing fees on the unpaid rates; (4) whether the plaintiff's claim against the 2nd, 3rd, 4th and 5th defendants pursuant to the court order dated 27 April 2000 was competent without service of the writ of summons on the 2nd defendant; (5) whether the 1st defendant was under a duty to inform the purchasers of I assessments and review of rates; and (6) whether the plaintiff waived its claim against the defendants.

Held:

(1) The Supreme Court recognised the concept of equitable beneficial ownership in the Land Code (Cap 81)(Sarawak) in the case of the *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and Another Appeal*. Though the facts of that case were not the same as the present case, the underlying principle could be applied. To borrow the words of the Supreme Court, it would be "plainly unconscionable" to allow the purchasers of the sub-lots to enjoy the full benefits of ownership of the sub-lots without having to pay the rates and fees. The fact that the 4th defendant and some purchasers had settled the rates and fees for their sub-lots showed that the purchasers were aware and had accepted the fact that they were liable to pay the rates and fees once they became the beneficial owners of their lots. (paras 25 & 30)

(2) The word 'enforce' in item 101 of the Limitation Ordinance (Sarawak) (Cap. 49) specifically referred to an exercise of the rights of a first chargee. As such, the said item was not applicable to this case. The applicable item was item 97 of the said Ordinance. (paras 37 & 41)

(3) Only four assessment bills contained the endorsement informing the owners of the fees for non-payment of rates. Such proper notices must be given to the owners before the plaintiff could claim for the same. (para 49)

(4) There was no provision in the court order dated 27 April 2000 that all the then intended defendants must be served. Neither were they made as joint representatives for the purchasers. Further, there was no prejudice to the 3rd, 4th and 5th defendants as the representative action affected the purchasers which they represented and any execution of judgment obtained must be done with the leave of the court at which time those purchasers must be notified. (para 50)

(5) The duty lay with the 1st defendant to inform the purchasers of assessment and review of rates so long as the records of the plaintiff in respect of ownership of the sub-lots did not change. (para 53)

(6) The facts showed that the plaintiff did not by conduct waive the claims made in the suit. In fact, the plaintiff sent fresh notices to individual purchasers after the management office of Kuching Plaza updated their records. Those notices included the outstanding assessment rates. (para 54)

Case(s) referred to:

Barnes v. Jarvis [1953] 1 WLR 649 ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC ***(refd)***

Generation Product Sdn Bhd v. Majlis Perbandaran Klang [1997] MLJU 147 ***(refd)***

Kuching Plaza Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Another Appeal [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223 SC ***(refd)***

Majlis Perbandaran Klang v. Generation Product Sdn Bhd [2006] 2 CLJ 1151 CA ***(refd)***

Sutton v. Sutton 22 Ch D 511 ***(refd)***

Legislation referred to:

Kuching Municipal Ordinance, ss. 72, 73

Local Authorities Ordinance 1996, ss. 74(1), 154(1)

Sarawak Land Code, s. 148(2)(c)

Other source(s) referred to:

MR Mallick, *Limitation Act,* 19th edn, p 666

SP Sen Gupta, *The Law of Limitation and Adverse Possession,* 8th edn, p 980

For the plaintiff - Chan Kay Poh (Chan Choon Lin with him); M/s Chan & Chan

For the 1st defendant - Kilat Beriak (Christine Loh with him)

For the 3rd, 4th & 5th defendants - Satindir Singh Sandhu

Reported by Usha Thiagarajah

JUDGMENT

David Wong Dak Wah JC:

Introduction

[1] When this matter was case managed by this court, I asked counsel whether or not it can be tried without the calling of oral evidences. After several consultation sessions among counsel, they informed me that they had agreed that the trial of this suit can be done in the following manner:

(a) based on the agreed issues, facts and the bundle of documents prepared and submitted by the parties;

(b) without oral evidences; and

(c) based on written and oral submissions.

[2] Pursuant to that agreement, counsel tendered their respective submissions (all together 9 in numbers, the last 3 tendered on 5 January 2007) and oral clarification of counsel's respective submissions was made on 30 November 2006 and 5 January 2007.

[3] Mr. Chan Kay Poh (Mr Chan) appeared for the plaintiff, with Mr. Kilat Beriak (Mr. Kilat) acting for the 1st defendant and Mr. Satindir Singh Sandhu (Mr. Sandhu) appearing for the 3rd, 4th, and 5th defendants who also represented all the purchasers of the various lots in Kuching Plaza by an order of the court dated 27 April 2000.

Agreed Facts

[4] The agreed facts as contained in encls. 373 and 398 are in summary form these.

[5] The plaintiff is a corporation established under the City of Kuching North Ordinance 1988 (Ordinance No. 3 of 1988) and is empowered to collect rates due by property owners. The plaintiff prior to 1 January 1998 was governed by the Kuching Municipal Ordinance (Cap. 116) (KMO) and later from 1 January 1998 was and is governed by the Local Authorities Ordinance 1996 (Chapter 20) (LAO) which repealed and superseded the Kuching Municipal Ordinance (Cap. 116)(KMO).

[6] The 1st defendant, Kuching Plaza Sdn. Bhd., was and still is the registered proprietor of all that parcel of land situate at McDougall Road, Kuching, Sarawak and described as Lot 16 Section 30 Kuching Town Land District ("the said land") and has built and erected on the said land building and appurtenances thereon known as "Kuching Plaza".

[7] The Kuching Plaza was a development under the provisions of the Sarawak Strata Titles Ordinance 1974 and all agreements for the sale and purchase of the various sublots were subject to the provisions of the Sarawak Strata Titles Ordinance 1974, which has been repealed and replaced by the Strata Titles Ordinance 1995 (Chapter 18). Until now no subsidiary strata titles have

A been issued for the sublots in the Kuching Plaza despite the fact application had been made to the Land and Surveys Department quite sometime ago for the issuance of the subsidiary strata titles of the sublots.

B **[8]** The 1st defendant had sub-divided the completed space in Kuching Plaza into 155 sub-lots in accordance with the Approved Plan No. MO. 248/1972 and had during the period from 1979 to 1983, sold various sublots in the Kuching Plaza to various purchasers listed in Schedule I (see encl. 404). All purchasers C listed in Schedule I had paid the purchase prices of the sublots in full to the 1st defendant and in sole and exclusive possession and occupation of the sublots. The 2nd, 3rd, 4th and 5th defendants are some of the purchasers of the various sublots in the Kuching Plaza. The 1st defendant still owns the unsold sublots.

D **[9]** The plaintiff issued Assessment Bills in respect of the 1st defendant's own sublots in the name of the 1st defendant for the period from the 2nd half of year 1989 to the 1st half of the year 1998.

E **[10]** The plaintiff issued Assessment Bills in respect of the sublots sold by the 1st defendant to the purchasers in the joint names of the 1st defendant and the purchasers for the period from the 2nd half of year 1989 to the 1st half of year 1998.

F **[11]** On or about 13 June 2005, the plaintiff wrote to the purchasers of the various sublots informing them that their sublots have been updated based on the Sale and Purchase Agreements submitted by the Kuching Plaza Management Office, and drawing their attention to the outstanding assessment rates (rates) for G period from 2nd half 1989 to 1st half 2005 that had to be paid before 30 June 2005.

[12] On 31 July 2005, the plaintiff, by demand notices to the 1st defendant and the purchasers demanded from them outstanding H rates for the period from the 2nd half of year 1989 to the 1st half of year 1998 and for fees for the period from the 1st half of year 1992 and subsequently thereafter.

[13] The 3rd defendant is the beneficial owner of sublots 407 and 408 in the Kuching Plaza under and by virtue of two (2) Sale and I Purchase Agreements between the 1st defendant and himself both dated 16 June 1983.

[14] The 4th defendant is the beneficial owner of sublot 339 in the Kuching Plaza under and by virtue of Sale and Purchase Agreement between the 1st defendant and herself dated 2nd September 1981 and had by 30 March 1993, paid in full the rates inclusive of default fees for the period from the second half year 1989 to the first half year 1998 pertaining to her own sublot 339. As such, the plaintiff is not asking for any order against the 4th defendant in her personal capacity. Some purchasers listed in Schedule I had also paid their rates and default fees.

[15] The 5th defendant is the beneficial owner of sublots 411 and 412 in the Kuching Plaza under and by virtue of two (2) Sale and Purchase Agreements between the 1st defendant and himself both dated 16 June 1983.

[16] All the Assessment Bills of the plaintiff on Sublots 407, 408, 411 and 412 before the year 2004 were issued in the sole name of the 1st defendant. They were addressed and dispatched by the plaintiff to the then registered office of the 1st defendant.

[17] From the year 2004 onwards, all the Assessment Bills on Sublots 407, 408, 411 and 412 have been issued in the joint names of the 3rd or 5th defendant (as purchasers) and the 1st defendant. They have been addressed and dispatched by the plaintiff to the postal address of the 3rd or 5th defendant.

[18] The plaintiff has not served the writ of summons on the 2nd defendant. On 25 June 2005, 12 July 2005, and 31 July 2005, the plaintiff, by demand notices to the 3rd and 5th defendants demanded from them directly for the first time outstanding rates and fees, including those claimed in para 8(a) to (j) and para 9(a) to (g) of the re-re-amended statement of claim.

Agreed Issues

[19] Counsel have given me two sets of agreed issues (encl. 374 and 397), which I have summarized into six issues (encl. 418) and on 5 January 2007 I extended to counsel copies of encl. 418 for their approval. After perusal, counsel confirmed to me that those are the only issues which need to be addressed. These six issues are as follows:

1. Who is liable to pay the rates and fees imposed by the plaintiff?

[20] From the outset, it should be stated that Mr. Chan has in his submission (encl. 404) informed the court that the plaintiff's claim will be only for unpaid rates and fees up to 1st half 1998 despite what is stated in the re-re-amended statement of claim.

[21] Also, Mr. Kilat at the beginning of the hearing from the Bar conceded that the 1st defendant is liable and willing to pay the rates of the sublots which they own but for the rates of sublots not owned by them, he submitted that the liability to pay rests with the defendants as purchasers who had paid the full purchase price and been and are in exclusive possession of the various sublots of the Kuching Plaza.

[22] For Mr. Sandhu, he contended that the liability rests with the 1st defendant as they are still the registered proprietors irrespective or not whether the 3rd, 4th and 5th defendants and the purchasers they represent are the beneficial owners of the various sublots. Here it is not disputed by counsel that the 3rd, 4th and 5th defendants and the purchasers they represent are the beneficial owners of the various sublots and the 1st defendant is only a bare trustee for them (see *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 CLJ 561).

[23] Mr. Sandhu's contention is based on the following sections of KMO:

Section 64:

> 64.(1) Every owner of rateable property within the meaning of this Ordinance, which is not excepted from payment of rates under section 54, shall pay such annual rates thereon as the Council may, with the approval of the Yang Dipertua Negeri in Council, prescribe by notification in the Gazette and for the purpose of imposing such rates the Council may by notification signified in the Gazette divide the area of the City of Kuching North.

Section 2 KMO defines

"Owner":

> (a) in relation to any land or building, means the registered proprietor of the land as defined in the Land Code and, if in the opinion of the Council the registered proprietor of the land cannot be traced, the person for the time being receiving the rent of the premises in connection

with which the word is used whether on his own account or as agent or trustee for any other person or as receiver or who would receive the same if such premises were let to a tenant; and

(b) in the case of a subdivided buildings, includes the management corporation and any subsidiary proprietor: the expressions "management corporation" and "subsidiary proprietor" shall have the meanings assigned to them in the Strata Titles Ordinance, 1974.

[24] In interpreting any statute, the general rule is to look at the words used to determine the intentions of parliament. One must also look at the context in which the words are used and above all use common sense. Lord Goddard CJ in *Barnes v. Jarvis* [1953] 1 WLR 649 aptly said:

> A certain amount of common sense must be applied in construing statutes.

[25] Here I must look at the Sarawak Land Code and determine whether the words "registered owners" include equitable beneficial owners. In the case of *Kuching Plaza Sdn. Bhd. v. Bank Bumiputra Malaysia Bhd. and Another Appeal* [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223, the Supreme Court recognized the concept of equitable beneficial ownership in the Sarawak Land Code. The facts as reported were these: The 1st appellant borrowed RM5 million from the respondent, BBMB, in 1979 to build Kuching Plaza (the Plaza) on certain land (the said land). The loan was secured by way of first legal charge over the said land. Under the registered charge, the redemption of title was fixed at RM40,000 per shop lot calculated on the basis of RM5 million divided by 128 shop lots to be sold by the 1st appellant. Another important stipulation was that in the absence of strata titles to the shop lots, a request for release of loans to individual purchasers would be construed as a request for the discharge of title and the redemption of RM40,000 per title would apply.

[26] The Land Office was authorized to only issue strata titles upon completion of all 3 phases of the Plaza. From 1979 to 1985, 122 lots in the shopping centre of the Plaza were sold to various purchasers, including the 2nd to 5th appellants. The 2nd appellant purchased 2 shoplots and obtained a loan from BCSB which released the redemption sum of RM80,000 direct to BBMB which in turn issued a letter of undertaking that the strata titles for the

two lots would be released to BCSB. The 3rd, 4th and 5th appellants together purchased a shop lot and obtained a loan from BBMB which released a redemption sum of RM40,000 for the discharge of the shop lot from the main charge. The full purchase price was later paid by these purchasers.

[27] In 1987, BBMB demanded from the 1st appellant approximately RM1.5 million as unpaid monies. As a result of KP's failure to reply, BBMB obtained, under s. 148(2)(c) of the Sarawak Land Code an order for sale of the said land inclusive of the shop lots already sold to the 2nd to 5th appellants.

[28] The appellants' appeal against the order for sale was dismissed; hence this appeal to the Supreme Court, the contention being that BBMB, by its own stipulation and conduct, had looked to the purchasers to redeem the property charged and that it was not just in the circumstances for an order for sale to issue. BBMB raised the doctrine of indefeasibility of a registered charge as a defence.

[29] The Supreme Court held that the doctrine of indefeasibility cannot apply in the circumstances even though the charge was registered in the name of Kuching Plaza Sdn. Bhd. as chargor. The rationale is simple and it is that the purchasers of the various sublots had paid the full purchase price and with it the redemption amount to the respondent/chargor and to allow them to foreclose would be plainly unconscionable.

[30] Though the facts there are not the same as the case before me, I am of the view that the underlying principle can be applied. If I were to uphold Mr. Sandhu's submission, it would be grossly unfair to the 1st defendant. In fact to borrow the words of the Supreme Court, it would be 'plainly unconscionable' to allow the 3rd, 4th and 5th defendants and the purchasers they represent to enjoy the full benefits of ownership of the various sublots without having to pay the rates and fees. The fact that the 4th defendant and some purchasers had settled the rates and fees for their sublots shows that the purchasers were aware and had accepted the fact that they are liable to pay the rates and fees once they became beneficial owners of their lots.

[31] Accordingly I hold that the 3rd, 4th and 5th on behalf of themselves and the rest of the purchasers of the various sublots in Kuching Plaza are liable to pay the rates and fees issued by the plaintiff on their own sublots.

[32] Before I deal with the next issue, if I may make some observations on the fact that the strata title deeds to each sublot had not been issued by the relevant authority. This is one of those cases where as a result of the just mentioned omission by the relevant authority, three groups of people suffer. Firstly, the purchasers who had paid the purchase price (and also presumably the premium amount for the issuance of strata title deeds and the stamp duty for the transfers of the title deeds) are being deprived of their title deeds. Secondly, the Sarawak State government is presently deprived of the premium payable for the issuance of the Strata Title deeds. Thirdly, the Federal Government is also being deprived of the stamp duty payable on the transfer of the strata title deeds from the 1st defendant to the purchasers. Furthermore, if the strata title deeds had been issued promptly, there would not be any necessity for this case and *Kuching Plaza Sdn. Bhd. v. Bank Bumiputra Malaysia Bhd. and Another Appeal (supra)* as both cases required the courts to interpret the words "registered owner" in the context of the Sarawak Land Code. So much cost to the parties and judicial time would have been saved.

2. Which part of the plaintiff's claims is affected by Sarawak Limitation Ordinance (Cap 49)?

[33] It was submitted by the Mr. Chan that item 101 of the Schedule of the Limitation Ordinance (Cap. 49 is the applicable item in this case. Item 101 reads as:

101. *To enforce payment of money charged upon immovable property.*	... 12 years	When the money sued for becomes due.

[34] The rationale for the applicability of item 101, as contended by Mr Chan, is that the unpaid rates and fees are a 'first charge' on the properties as provided in s. 72 of KMO.

[35] Both Mr. Kilat and Mr Sandhu submitted that Mr Chan's submission is flawed and relied on the Indian Commentaries of item 102 of the Schedule of the Indian Ordinance 1908 which is in *pari materia* with item 101 of the Sarawak Limitation Ordinance.

Both counsel submitted that item 101 only applies when the plaintiff applies to the court for the sale of the property to recover the unpaid rates and fees. What the plaintiff had done was by way of a normal civil action to recover the unpaid rates and fees from individual purchasers. Mr. Sandhu quoted from Rustomji's *"The Law of Limitation and Adverse Possession"*, by S.P. Sen Gupta, 8th edn, at p. 980:

> … When under a local Municipal Act, sums due on account of house-tax, water-tax, or property-tax, are declared to be a first charge upon the buildings or lands with reference to which the tax is imposed, a suit by the Municipality to recover arrears of such taxes by sale of the buildings or lands concerned comes within the 12 years' rule in Art 62, unless a different period of limitation is prescribed by the local Act …

and at page 981:

> 12. Remedy against mortgaged property: Personal relief. – Art. 62 is restricted to cases in which payment is sought to be enforced out of the immovable property on which it is charged or mortgaged. If the remedy for a personal decree against the defendant is barred owing to the plaintiff's delay, he cannot extend the period of limitation by asking for an enlarged relief by way of a charge upon the defendant's property. Art. 62 refers to a suit for money charged on immovable property to raise it (eg, by sale) out of that property, or out of what is a substitute for that property. Art. 62 does not apply to every remedy which the instrument carries with it. Thus, it does not give 12 years for the personal remedy against the mortgagor as well as against the mortgaged property. The claim for a personal decree is governed by a different Article and not by Art. 62. So, a suit (based on the mortgage) for personal relief against the mortgagor is subject to the ordinary period of limitation for such personal relief.

[36] Mr. Kilat referred me to B.B. Mitra's *"Limitation Act"*, by M.R. Mallick, 19th edn, where at p. 666, the learned author said:

> Article 62 governs suits to enforce payment of money secured by mortgage or otherwise charged upon the immovable property. This Article is applicable to all suits for sale or foreclosure regarding mortgage as well as to suits to enforce charge within the meaning of s. 100 of the Transfer of Property Act. The old

article also covered both suits. The suits to recover the money out of the immovable property mortgaged or charged but not to suits to recover the money due from the defendant personally.

[37] Having considered the arguments, I agree with both Mr. Kilat and Mr. Sandhu for the reason that the word 'enforce' is used in item 101. If the legislature had wanted a meaning as subscribed by Mr. Chan, the word 'recover' would be more appropriate. The word 'enforce' was used, in my view, to specifically refer to an exercise of the rights of a first chargee.

[38] Mr. Chan also submitted that the case of *Sutton v. Sutton* 22 Ch. D 511 which held that the limitation period for enforcing a charge under the Real Limitation Act 1874 is 12 years, should be followed by this court. With respect, the facts there are different in that there was a registered mortgage, while here we have an unregistered first charge and not an action to foreclose the sublots. In any event the commentaries on the Indian Limitation Act are more applicable as the words used in both legislations are identical.

[39] Accordingly I hold that item 101 of the Sarawak Limitation Ordinance does not apply to this case

[40] I come now to the question which item of the Sarawak Limitation Ordinance applies in this case. Both Mr. Kilat and Mr. Sandhu submitted that the items are either item 1 which states:

1.	*Upon a Statute, Act, Regulation or By-law doe a penalty or forfeiture*	... 1 year	When the penalty or forfeiture is incurred

or item 97 which states as follow:

97.	Suit for which no period of limitation is provided elsewhere in this schedule	... 6 years	When the right to sue accrues

[41] For reasons set out later in issue 3, I do not find that the rates and fees can be regarded as penalty and as such, item 1 does not apply and I accordingly find that item 97 would be the applicable one.

A 3. Did the plaintiff comply with the statutory provisions in imposing the fees on unpaid rates? If so are the defendants liable to pay the imposed fees?

[42] Mr. Kilat's contention here was that the plaintiff had not B proved that the fees imposed were one which was proportionate to the added costs of monitoring the unpaid assessment. For this he relied on the High Court decision in the case of *Generation Product Sdn. Bhd. v. Majlis Perbandaran Klang* [1997] MLJU 147. However when it was pointed out by Mr. Chan that that decision C had been overturned by the Court of Appeal in *Majlis Perbandaran Klang v. Generation Product Sdn. Bhd.* [2006] 2 CLJ 1151, he withdrew his contention. In overruling the decision of the High Court, the Court of Appeal through Mokhtar Sidin JCA at p. 1171, of the judgment said:

D

> The Appellant, on the other hand, contended that Section 147(1) gives the authority to fix the 'fee' as stated in that section, *viz* '… the owner or owners shall be liable to pay the same together **with such fees as the local authority may fix from time to time**' (emphasis added). The wordings clearly show that the E appellant is the sole authority to fix the fee. The appellant could, if it wishes, fix the 'fee' on the actual costs or disbursements to recover the sum due or fix a standard rate for all ratepayers. In the present appeal, the appellant chose the latter in that the 'fee' is fixed at a percentage of unpaid amount and arrears. Section F 147(1) gives such right to the appellant and we could not find any provision in the Act which restricts that right. In our view, the respondent could only challenge the fixed 'fee' if it could be shown that it is so unreasonable.

After referring to some English cases, Mokhtar Sidin JCA said at G p. 1177:

> The above decisions make it very clear that where a statute gives the power to an authority and the authority exercises that power, the **power could only be challenged by showing bad faith, mistake in construing the limits of the power, a procedural** H **irregularity or unreasonableness.**
>
> In the present appeal, the appellant is empowered to fix the 'fee'. The respondent only raised the issue of actual costs or disbursements of correspondences and notices. In their submission before us and in the court below, we could not find anything to I show that the fixed 'fee' was made in bad faith, mistake in construing the limits of the power or unreasonable. We find no merit in the contention of the respondent.

[43] The wordings in s. 73 of the KMO (s. 74(1) of the LAO (Chapter 20) are the same and it states as: A

> 73(1) If any sum payable in respect of any rate remains unpaid for a period of ninety days from the date upon which payment is due and payable, the owner or owners shall be liable to pay the same together with **such fee as the Commissioner may fix from time to time.** (emphasis added) B

[44] Despite the above authority, both Mr. Kilat and Mr. Sandhu submitted that KMO requires the plaintiff to gazette the imposition of fees because that is what is required for the C assessment of the rates and unless this had been done the fees are deemed to be invalid. However they were not able to point to any specific provisions similar to the assessment of rates in KMO requiring this. Without such specific provision, I reject their contention. In any event, fees on unpaid rates cannot be regarded D as the same as rates.

[45] Further as required by the dictum in the Court of Appeal, the defendants in challenging the imposition of fees must prove to the court that the amount was an unreasonable one and was E imposed in bad faith. No such proof is before me.

[46] Mr. Sandhu also submitted that the fees imposed constitute a penalty in terrorem. With respect I am not quite sure what Mr. Sandhu meant by his submission. Was he saying that the fees F were unreasonable? If he was, then he has not tendered any proof to that effect. Hence I find that the submission is not sustainable.

[47] I come now to whether or not fees imposed were claimed for by the plaintiff. Even though the plaintiff may have decided to G impose fees on unpaid rates, they still have to claim for it by notifying the defendants. One way of such notice is by way of endorsement on the assessment bills. In the present case the plaintiff had made such endorsement on some assessment bills, which reads as follows: H

> default fee of 1% per month or part thereof will be levied on assessment rates settled after the last date of payment.

[48] It appears from the documents before this court that not all assessment bills contained such endorsement. In fact counsel had I confirmed that only four assessment bills contained such endorsement and they were as follows:

A 3rd defendant: RM644 for Lot 407 & RM653 for 408

5th defendant: RM644 for Lot 411& RM522 for Lot 412

[49] Mr. Chan however submitted that the final notices dated 10 March 1993 in exh. A and B are evidence that proper notices had been given. Further he relied on the certificates produced in exh. C and D and s. 154(1) of the LAO to submit that the plaintiff has made out a *prima facie* case of liability for the unpaid fees. On this I agree with Mr. Kilat that Mr. Chan's submission pre supposes that there were proper notices given to the defendants. As stated earlier there were only 4 assessment bills which contained the endorsement informing the owners of the fees for non payment of rates. It is my view that such proper notices must be given to the owners before the plaintiff can claim for the same.

4. Whether the claim against the 2nd, 3rd, 4th and 5th defendants, in their representative capacity, pursuant to the court order dated 27 April 2000, is competent as against the 3rd, 4th and 5th defendants without the service by the plaintiff of the writ of summons on the 2nd defendant?

[50] The answer to this issue lies in the order made by the court on 27 April 2000 (encl. 55). There is no provision in the order that all the then intended defendants must be served. Neither were they made as joint representatives for the purchasers. Further I see no prejudice to the 3rd, 4th and 5th defendants as the representative action affects the purchasers which they represent and as rightly pointed out by Mr. Chan, any execution on any judgment obtained must be done with the leave of the court, at which time those purchasers I would presume must be notified. Accordingly I hold that Mr. Sandhu's contention is without merit.

5. Whether, in law, the rates and fees levied for outstanding rates claimed against the 3rd, 4th and 5th defendants in this action had been validly assessed and levied under the Kuching Municipal Ordinance (Cap. 116) and/or the Local Authorities Ordinance 1996 (Cap. 20)? Whether the 3rd, 4th and 5th defendants are liable under the Kuching Municipal Ordinance (Cap. 116) and/or the Local Authorities Ordinance 1996 (Cap. 20) for the rates of the period from 2nd half 1989 to 2nd half 2003 under the Assessment Bills issued by the plaintiff in the sole name of the 1st defendant?

[51] It is an agreed fact that the assessment bills prior to 31 December 2003 were issued in the sole name of the 1st defendant and because of this Mr. Sandhu submitted that the rates and fees were not validly assessed and levied as his clients were not properly informed. Firstly it should be noted that the 1st defendant through Mr. Kilat had rightly conceded from the bar that the plaintiff had complied with the statutory provisions in assessing and levying the rates. Mr. Sandhu's submission, with respect, may have some merit had the 3rd, 4th and 5th defendants complied with their statutory duty provided for in s. 76J – (1) which states as follows:

> Whenever any rateable property within the municipality is sold or transferred it shall be the duty of the seller or transferor and the purchaser or transferee within three months after such sale or transfer to give notice thereof to the Council in Form F of the Second Schedule.

[52] There is no dispute here that that duty had not been complied with by the defendants until 15 December 2003 when KP Complex Management Sdn. Bhd. wrote to the plaintiff enclosing all the sale and purchase agreements of the purchasers of various lots in Kuching Plaza.

[53] In any event, I am of the opinion that the duty lies with the 1st defendant to inform the purchasers whenever there is assessment and review of rates as long as the records of the plaintiff in respect of ownership of the sublots had not been changed.

6. Whether the plaintiff has, by conduct subsequent to the filing of this action, abandoned and/or waived their claim in this action on the rates and fees levied for outstanding rates as against the 1st, 3rd, 4th and 5th defendants in both their personal and representative capacity, and/or whether the cause of action against them in this action has been extinguished by such conduct?

[54] With respect, I don't quite understand the contention put forth by both Mr. Kilat and Mr. Sandhu. What the plaintiff did was to send fresh notices to individual purchasers after their records had been updated by the KP Complex Management Sdn. Bhd. Those notices included outstanding rates up to 1st half 2005. How that can amount to conduct of waiver of the claims made in this suit is baffling to me. Hence I find no merit in this contention.

[55] For reasons given above, I make the following orders:

1. The 1st, 3rd, 5th defendants and the purchasers which the 3rd and 4th and 5th defendants represent shall be liable to pay the rates and fees levied for their own respective lots.

2. In respect of the unpaid rates:

   In respect of the 1st defendant, judgment to the plaintiff for the sum of RM321,348.

   In respect of the 3rd defendant, judgment to the plaintiff in the sum of RM14,706.50

   In respect of the 5th defendant, judgment to the plaintiff in the sum of RM13,221.10

   In respect of the other purchasers represented by the 3rd 4th and 5th defendants, judgment to the plaintiff in the sums as listed in encl. 433 for each respective lots owned by the individual purchasers as listed in encl. 433.

3. In respect of the fees levied on unpaid rates:

   In respect of the 3rd defendant, judgment to the plaintiff in the sum of RM2,643.47.

   In respect of the 5th defendant, judgment to the plaintiff in the sum of RM2,376.82

4. Statutory interest of 8% per annum on the judgment sums from the date of this order till full payment of the judgment sums.

5. Costs to the plaintiff to be taxed unless agreed.

6. The counterclaims of the 1st defendant are struck out with no order as to costs.